IN THE

SUPREME COURT OF ILLINOIS,

CENTRAL GRAND DIVISION.

JANUARY TERM, A. D. 1878.

ELIPHALET W. BLATCHFORD, ET AL.,
APPELLANTS,

v.

HENRY W. NEWBERRY, ET AL.,
APPELLEES.

Appeal from Circuit Court, Cook County.

OPINION OF THE COURT,

FILED JUNE 24th, A. D. 1878.

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET.
1878.

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131. *v.* } FROM COOK.
HENRY W. NEWBERRY, ET AL. }

OPINION OF THE COURT

BY MR. JUSTICE SHELDON.

This case is one involving the construction of a will. Walter L. Newberry, a citizen of Chicago, made his will on the 30th day of October, 1866, and died November 6th, 1868. He left a widow and two unmarried daughters. By his will, he devised and bequeathed unto two trustees his whole real and personal estate, after the payment of certain specific legacies, of inconsiderable amount, to be held upon the general trusts declared in the will until its distribution by them to the persons ultimately entitled, the will containing careful directions governing, during its period, the administration of the estate and its income. The estate was a very large one, of the estimated value of from four to five millions of dollars.

The will provides for an annual payment, by the trustees, of ten thousand dollars to the wife of the testator, and also gives to her certain articles of personal property, such as furniture, horses and carriages, books, and paintings, and a life estate in the homestead, situated in the city of Chicago, on the condition that she would consent to accept the same in lieu of her dower right, and all other right in the estate.

The remainder of the net income of the estate was to be divided by the trustees equally between the two daughters, for life, with benefit of survivorship between them in such income.

After their lives, and that of the wife, the whole of the estate was to be by the trustees divided equally amongst, and distributed to, the children of the daughters; the child or children of either taking the whole in default of lawful issue of the other. There is then this further provision, upon which the question arises, "In case of the death of "both of my said daughters, without leaving lawful issue, "then immediately after the decease of my wife, if she "survive my said daughters, but if not, then immediately "after the decease of the last surviving one of my said "daughters, my said trustees shall divide my estate into "two equal shares, my said trustees being the sole judges "of the equality and correctness of such division, and shall "at once proceed to distribute one of such shares among "the lawful surviving descendants of my own brothers "and sisters; such descendants taking *per stirpes* and not "*per capita*.

"The other share of my estate shall be applied by my "said trustees, as soon as the same can consistently be "done, to the founding of a free public library, to be lo-"cated in that portion of the City of Chicago now known "as the North Division."

Both of the daughters have died without issue, and un-

married; one dying in February, 1874, the other, Julia, in April, 1876. The widow of the testator is still living. She within one year renounced her rights under the will, and took, under the law of Illinois, one-third of the personalty and her dower in the realty.

Eight nieces and nephews and ten grand nieces and nephews of the testator (the parents of the latter being dead), living at the death of the last daughter, Julia, constitute the complainants in the bill in chancery herein, which was exhibited in the Circuit Court of Cook County, asking a present distribution of the estate. The court below granted the prayer of the bill, and the defendants appeal.

The question for determination is, can there be, now during the life-time of Mrs. Newberry, a legal division of the estate by the trustees, one-half to the descendants of the testator's brothers and sisters, and the other half to the public library

Complainants claim that upon the death of the last daughter without issue, the class to whom the devise was in part made, viz: the lawful "surviving descendants" of testator's brothers and sisters were in existence and capable of taking; that at that time the estate became vested in the members of the class; that the testamentary life estate which was given to the widow by the will was the impediment to the distribution of the estate until the death of the widow, and the reason of the postponement of the distribution until that event; that such life estate having been extinguished by her renunciation, it is, as to the complainants, the same as if her life had come to an end, and that the remainder to them was accelerated under the doctrine of the acceleration of remainders, so that they became entitled to the immediate enjoyment thereof.

The defendants assert that the death of the widow is fixed by the will as the time when the division and distri-

bution by the trustees shall be made; and further that no distribution can be made till then, because they say that that time enters into the description of those who are to take; that the division is to those descendants only who survive the death of the wife; and until that time it cannot be ascertained who the donees under the will are.

Who are the donees in this devise, to whom one-half of this estate is to be distributed? They are a class of "surviving descendants" of the testator's brothers and sister. The members of this class are to be determined by the event or time to which the word "surviving" relates.

There are three periods here to which it may be claimed to relate,—the death of the testator; that of the last daughter without issue, Julia Newberry; or the time appointed for the distribution upon the death of Mrs. Newberry. However it may have been at some former time, we understand the rule now prevailing to be, that where a gift to survivors is preceded by a life or other prior interest, it takes effect in favor of those who survive the period of distribution, and those only.

In *Knight* v. *Poole*, 32 Beavan, 548, there was a bequest to A, and at his death, to B, and at "her decease" to be divided among four named persons, or "as many of "them as may be living." The question was, at what time the persons to take must be living; for some survived one of the tenants for life, and died before the other. Sir JOHN ROMILLY said: "I am clear that no person took except "those who survived the period of division. There is a "gift of property to A for life, and at his death (with certain "exceptions) to B; and at her decease it is to be divided be- "tweer the surviving brothers and sisters who are married. "The case of *Cripps* v. *Wolcott* clearly applies, and only "those who survive both A and B could take. The property "is to be divided; and nobody was to take who was not

"living at the period of division. * * * * I am of "opinion that the words in question have relation to the "period of division; and that the plaintiff takes no interest "in the property."

In *Stevenson* v. *Gullan*, 18 Beavan, 590, there were bequests to two, for their lives; and from and after their decease, to their "surviving children." One of the tenants for life had seven children living at the death of the testatrix; six were living at his own death; but only four were living at the death of the other tenant for life. The question was, to what period the word surviving must be referred. Sir JOHN ROMILLY said:

"The survivorship must be referred to the death of the "last of the tenants for life, which is the period of dis- "tribution. Where the income of a fund is given to ten- "ants for life, and there is a gift over after their deaths, to "children, or a class of persons surviving, it is a gift only "to those who are then surviving."

In *Spurrell* v. *Spurrell*, 11 Hare, 54, the testatrix, by will, gave all her property whatsoever to her mother, for life, and after a legacy of two hundred pounds, "then the "residue of my property to be equally divided between "my surviving brothers and sisters, share and share "alike." Sir W. PAGE WOOD said: "I think the word "'surviving' in this will, as applied to the brothers and "sisters of the testatrix, must mean surviving at the time "of the distribution of the fund. The word was capable "of receiving four different constructions, which were "suggested in the argument. * * * I think "it better that the court should hold that there is no rule "referring the time of survivorship of the legatee to the "death of the testator. The natural inference is rather "the other way. And the court must ascertain the true "meaning of the testator, after looking at every portion of "his will. * * * It seem to me that the period

"to which the word surviving refers, is the period when "the fund came to be distributed—when the event has "happened which is to guide the executors in making "distribution."

In *Young* v. *Robertson*, 8 Jur., N. S., 825, this question arose, in 1862, in the house of Lords: The testator directed his estate, real and personal, to be divided equally among his grand-nephews and grand nieces. The Lord Chancellor there said: "Now, I apprehend it to be a "settled rule of construction, and in itself a very reason-"able and natural rule, that words of survivorship occur-"ring in a settlement (that is a will), should be referred to "the period appointed by that settlement, for the payment "or distribution of the subject matter of the gift. That "is undoubtedly the rule that is now finally established "in this country. * * * The result, therefore, "is, that in the event of such a gift, the survivors are to be "ascertained, in like manner, by a reference to the period "of payment, or of distribution, namely, the expiration of "the life estate." Numerous other like cases might be cited.

This court recognized and applied the above rule in *Ridgeway, and others*, v. *Underwood, and others*, 67 Ill., 419, where, after referring to 2 Jarman on Wills, 3d American Ed., 462, and *Mariott* v. *Abell*, 7 Law Reports, Equity Cases, 478, as authorities to show the existence of such a rule of construction, it was said: "Here was a "'prior interest' which was to be extinguished by lapse "of time, before the land could be sold. The land was "then to be sold, and the proceeds divided between "certain of the children. Here then applies, with "literal exactness, the rule expressed by Jarman. The "will provides for survivorship. It is indefinite in its "terms, and the rule solves the doubt by applying the

"language of the testator to those who survive the period of "distribution."

In *Linton* v. *Boyd*, 19 Ohio State, 30, the court, after citing the case of *Young* v. *Robertson*, *supra*, and the statement of the rule there that words of survivorship should be referred to the period "for the payment or distribution of "the subject-matter of the gift," observed: "This un- "doubtedly is the general rule recognized in this country, "subject, of course, to such modifications as the paramount "rule giving effect to the intention of the testator, may re- "quire." And see *Olney* v. *Hull*, 21 Pick., 311; *Teed* v. *Morton*, 60 N. Y., 503, and cases cited in note (y); 2 Williams on Executors, 1576, 7th edition.

We find it then to be the settled rule of law that, as expressed in *Cripps* v. *Wolcott*, 4 Mad., 11, "surviving" means surviving at the time of the distribution and possession of the estate, unless a contrary intent is specially found in the will. We do not find any such contrary intent in this will.

The form of the gift here, too, there being none except *in the direction to distribute*, adds to the strength of the rule in confining the reference of the words of survivorship to the time of distribution.

The significance which the authorities attach to such a form of gift will be found to be as laid down in *Leake* v. *Robinson*, 2 Meriv., 363. There was there a direction to trustees, in case William Rowe Robinson should die without issue, to pay, apply, and transfer unto and among all and every his brothers and sisters, share and share alike, upon their attainment of twenty-five, or marriage, respectively. The question was, whether those only were the donees who lived until twenty-five, and attained the actual period of payment and transfer, or whether that was merely a time fixed for payment of shares that had vested at

some antecedent period. The master of the rolls, Sir WILLIAM GRANT, said:

"There is no direct gift to any of these classes of per-
"sons. It is only through the medium of directions given
"to the trustees that we can ascertain the benefits intend-
"ed for them. * * There being, as I have already said,
"no direct gift to the grand-children, we are to see in what
"event it is that the trustees are to make it over to them.
"The attainment of twenty-five is necessary to entitle any
"child to claim a transfer. It is not the enjoyment that is
"postponed; for there is no antecedent gift, as there was
"in the case of *May* v. *Wood*, of which the enjoyment
"could be postponed. The direction to pay is the gift, and
"that gift is only to attach to children who shall attain
"twenty-five. * * None but a person who can predi-
"cate, of himself, that he has attained twenty-five, can
"claim anything under such a gift." To similar effect, see *Vawdry* v. *Geddes*, 1 Rus. and Myl., 203; *Locke* v. *Lamb*, 4 Law Report Equity, 372; *Drake* v. *Pell*, 3d Edw. Chancery, 267.

Under the form of gift here, there is no gift to any one except such as are *surviving*, and capable of taking at the time of distribution. Surviving at the time of distribution is a part of the description given by the will of the donees, and there is no gift to any one who does not answer the description in this element of time. The donees then, here, are the descendants living at the time of distribution, whenever that time may be, and not those living at the death of Julia Newberry, unless that event should be coincident with the time of distribution; until the time of distribution, it is uncertain who will be alive to take then, and, until that time arrives, it cannot be ascertained and made certain who the donees are.

We find it unnecessary to enter into the discussion of the doctrine of contingent and vested remainders, the learning

pertaining to which was so elaborately gone into at the argument, and in the briefs of counsel. For even conceding the claim of complainants, that survivorship here is to be referred to the death of the last surviving daughter without issue, and that upon that event the devise to the surviving descendants of the testator's brothers and sister ceased to be a contingent, and became a vested estate in the descendants then living, still, unless the time of distribution had arrived, complainants could not maintain their bill for present distribution; and if the time of distribution has in fact arrived, the defendants' claim, that the devise is contingent as to persons, would seem to be of force no longer; as that contingency would have been determined, and the donees have become ascertained by the arrival of the period of distribution. So that we are brought to that which at last is the prime inquiry in the case: What is the time of distribution under the will? Has the period of distribution arrived?

The time appointed by the testator, in the contingency which has happened, the death of both daughters without issue, when the trustees should divide his estate into two equal shares, and at once proceed to distribute one of such shares among the lawful surviving descendants of his brothers and sister, is "immediately after the decease of "my wife." Complainants say, by the renunciation of the widow, their remainder has become accelerated under the rule of acceleration of remainders, so that it is as if the widow were dead, and that thus the appointed time of distribution has arrived.

This doctrine of acceleration is stated by Theobald, thus: "Where there is a gift to A for life, and after his death to "B, if A is incapable of taking because he is an attesting "witness, or from any other cause, or if he refuse to take, "the remainder is accelerated. The same is the case if "the life estate is revoked by the testator, or determined

" by a forfeiture clause." Theobald on Construction of Wills, 450. Jarman says, 1 Jarman on Wills, 3d Edition, 539: " The doctrine, evidently, proceeds upon the supposi-
" tion that although the ulterior devise is in terms not to take
" effect in possession until the decease of the prior devisee,
" if tenant for life, or his decease without issue, if tenant
" in tail, yet that in point of fact it is to be read as a limi-
" tation of a remainder, to take effect in every event which
" removes the prior estate out of the way." In *Full* v. *Jacobs*, L. R., 3 Ch. Div. 711, it is laid down " that a
" gift to A for life and from and after the decease of A,
" to B, C, D, or anybody else, means from and after the
" determination of the estate; and whether the estate is
" determined by revocation or by death, or by the incapa-
" city of the devisee to take, or by any other circumstance,
" the life estate being out of the way, the remainder takes
" effect, having only been postponed in order that the life
" estate may be given to A."

This doctrine of acceleration, however, is not an arbitrary one; but it is based on the presumed intention of the testator that the remainder-man should take on the failure of the previous estate, notwithstanding the prior donee may be still alive. And when it is the evident intention of the testator that the remainder should not take effect till the expiration of the life of the prior donee, the remainder will not be accelerated.

The further language of Vice-Chancellor MALINS, in deciding the case of *Full* v. *Jacobs*, *supra*, shows, clearly and fully the principle which governs this doctrine of acceleration. He says: " It is perfectly clear, in the first
" place, that the children are postponed to the mother, sim-
" ply because the mother is to have the property for her
" life. But if the mother cannot have the property for her
" life, why are the children to be postponed? The reason
" of their postponement altogether ceases. They are not

" to have it until after her death, because the testator as-
" sumed that she would have it during her life. But he
" was ignorant of the law that if he called in his daughter
" to be an attesting witness, the very gift he made to her
" would absolutely fail. Now, he has postponed his grand-
" children, that is, his daughter's children, solely because
" the daughter was to take for life; and if he had known
" that she could not take it for life, he would not
" have postponed the children until after her death.
" He would not have left her and her family totally
" destitute in the meantime. It is a mere acci-
" dent that the daughter cannot take the life estate, and
" I am of opinion that the children are postponed to the
" daughter, simply that she may have the property for life,
" and if she could not have it for life, the children would
" have it immediately."

In *Augustus* v. *Seabolt*, 3 Met. (Ky.), 155, where a prior life estate devised nad failed, the devisee for life still living, the court refused to accelerate the remainder, because to do so, would violate the plain language of the testator, and defeat his intention. The words of the devise over in remainder being, after the death of the devisee for life, to a class of children, or such of them as might be living at the time of the death of such devisee.

In the estate of Mathew Delaney, 49 Cal., 76, the testator devised his residue of estate to executors, with directions to sell certain realty, and after certain payments, to invest the proceeds remaining to pay certain income to his children and wife during her life; and on the death of his wife, to distribute his estate among his surviving children. The executor sold the realty, and the wife, renouncing the will, claimed under the statute. The plaintiff, a daughter, claimed in her bill, that by the renunciation, the trusts in the executor were defeated, and that she was entitled to immediate distribution. The Court refused the distribution, saying :

" The will devised to the executor the fee of the lands in " question, to be held in trust for the purposes mentioned " in the will. The renunciation by the widow of the testa- " tor of her right under the will, and the order of the Pro- " bate Court setting off to her a portion of the property as " common property, did not extinguish the trusts declared " in the will, nor divest the executor of the fee in the re- " maining portion of the property. The executor retained " the same power over the portion of the estate remaining " in his hands after the renunciation by the widow, and the " setting apart the property to her that he possessed prior " to the renunciation."

As respects the intention of the testator, which is to be regarded in the interpretation of a will, it is not the intention to be deduced from speculation upon what the testator may be supposed to have intended, but it is the intention as spoken by the words of the will. In 2 Williams on Ex'rs, 7th Ed., 1078, marg. p., it is laid down: " The use of the ex- " pression that the intention of the testator is to be the " guide, unaccompanied with the constant explanation that " it is to be sought in his words, and a rigorous attention " to them, is apt to lead the mind insensibly to speculate " upon what the testator may be supposed to have in- " tended to do, instead of strictly attending to the true " question, which is, what that which he has written " means."

As bearing upon the testator's intention, there are other words of the will which should be considered, as : " in case of the death of both my said daughters with- " out lawful issue, it is my will that thereafter the portion " of my estate, both principal and interest, which would " have belonged to them respectively, in case they or either " of them had survived, shall revert to and become a part " of my estate. And it is my will, and I direct that in the " case of each and every bequest, and of every instance in

" which I have directed my trustees to pay over money to " any person or persons whomsoever, if the person or per- " sons to whom or for whose benefit I have made such " bequests, or directed money to be paid as aforesaid, shall " have deceased, or from any cause be incapable of taking, " then the amount so bequeathed, or so directed to be paid " over, shall revert to and become a part of my estate, un- " less I have otherwise specifically directed." The gift or payment of money mentioned in the last sentence above, would seem to include this homestead and annuity offered to Mrs. Newberry by the will, if she would consent to take the same in lieu of her dower, which she became incapable, by her election, of taking ; and the direction is not, that there shall be an immediate distribution of the estate, but that the failing gift shall revert to and become a part of the estate.

" In case of the death of both or either of my " daughters, during the lifetime of my wife, leaving law- " ful issue living, it is my will, and I direct that such law- " ful issue shall have and receive from my said trustees " the portion of the net income from my estate which " would have belonged to that one of my daughters, from " whom they are descended, had she survived," etc. To this issue not only the income, but the whole capital is given at the time of final distribution. Now, supposing this last named contingency, the death of the daughters, leaving issue living, had happened, and the present claim for immediate distribution had been set up in behalf of such issue, could it then have been successfully claimed that as the widow had renounced, the estate of the trustees had ceased, and guardians of the minor issue should be appointed, and the capital of the estate be at once turned over by the trustees? that such was the intention of the testator, as disclosed by his will?

" In the management and conduct of my estate by my

" said trustees, it is my will, and I direct that the following " described premises and property, situate, lying and be- " ing in the city of Chicago aforesaid, to wit: Blocks " numbered nine (9), ten (10), eleven (11), and eighteen " (18), in Newberry's Addition to Chicago, and Lots " twenty-two (22), twenty-three (23), twenty-four (24), " twenty-five (25), and twenty-six (26), all in Block num- " ber one (1), in Butler, Wright and Webster's Addition " to Chicago, and Sub Lots one (1), two (2), and three (3), " of Lot five (5), in Block number four (4), of the original " Town of Chicago, shall not be sold or mortgaged by " my said trustees during the lifetime of my wife and " daughters, or either of them, nor until it shall become " necessary for my said trustees to divide and make final " division and distribution of my estate as hereinbefore in " this my will provided." Then follow careful provisions and directions concerning the powers and discretion of the trustees, concerning leases, sales of realty, the improvement of the estate, by the erection of " stores, dwell- " ings, hotels, offices of all kinds," as they may judge best for the interest of the estate, and that the premises above described shall be first improved. Provision is made in regard to investment by the trustees of moneys of the estate, directing the particular securities in which the investments shall be made.

The following provisions show that the testator contemplated that his wife might renounce the will and hold to her statutory estate:

" It is my will and desire to make provision for my be- " loved wife, Julia Butler Newberry, provided she con- " sents to accept of the same in lieu of and instead of her " dower right, and all other right, claim and demand to " my estate, or any part thereof, in the following manner:

" I give and bequeath to her," etc. " None of the " foregoing provisions for the benefit of my wife shall be

" operative or have any effect, but the same shall all and " singular be inoperative and void, unless she shall within " twelve (12) months after my decease relinquish in due " form of law all claim to my estate."

We are favored with the elaborate and able written opinion, delivered by the learned judge of the Circuit Court, who decided this case below, which we have read with interest and profit. It is there said that there can be no doubt that had Mrs. Newberry not renounced, but taken under the will, there could be no division or distribution now, " for two reasons: *First.* The will is clear " and distinct upon this point. Three lives must termi- " nate before distribution can be made. *Second.* In the " nature of things, no division and distribution could be had " so long as the widow's testamentary estate existed. She " was to derive an income from the whole property, and " the income was an incumbrance upon the whole prop- " erty. She was also to have a homestead, for life, out of ' testator's property." We are quite unable to perceive why the same reasons do not exist with full force under the widow's renunciation. The will is no more clear and distinct upon the point in the case of the one event than in the other. There are no words of the will connecting the time of final distribution with the so-called testamentary estate, any more than with the statutory one; nor, in fact, with either of them, at all.

As respects the other reason, there now remains the same impediment in the way of division and distribution, to wit: the out-standing life interest of the widow. Had she accepted the will, it would have been her homestead and annuity. Now, that she has renounced the will, it is her dower estate. It appears that a large portion of this estate is realty—defendant's counsel says three-fourths.

The case shows that the widow's dower has been assigned in the lands in Illinois, but not in the lands in Wis-

consin. The widow, then, has now a life estate in one-third of all the realty—showing there to be the same impediment of a life interest in the widow, to the final distribution now, that there would have been had she accepted the homestead and annuity. The annuity was not, by the terms of the will, made a charge upon the estate. A portion of the realty, it is true, has been disencumbered of the dower estate: but there was to be no piece-meal distribution of the estate; there was to be but one, a final, complete division and distribution of the entire estate, at once. This is clearly manifested by the will.

What is called here the testamentary estate was but an offer of a testamentary provision, in lieu of the statutory estate of the widow, which was never accepted. A provision, by will, in lieu of dower, is, in fact and in legal effect, a mere offer by the testator to purchase out the dower interest for the benefit of his estate. 2 Scribner on Dower, 496; 2 Williams on Ex'rs, Ed. 1877, 1364; *Isenhart* v. *Brown*, 1 Ewd. Ch., 413. This offered substitute for the statutory estate might or might not be accepted by the widow, as the testator knew and foresaw, the terms of the proposal expressly declaring that it should be inoperative and void, unless the widow should, within one year, make a formal relinquishment of her statutory estate. Both contingencies, then—the one that the widow might retain her statutory estate, and the one that she might accept the proposed substitutional estate, were actually present before the mind of the testator, and in equal view of both the contingencies, he made the direction of the will, appointing the time of distribution, and those directions must govern, and must have been intended to govern equally in either one of the contingencies.

We do not see how the rule of acceleration can be made to apply here, so that the time appointed by the will for the distribution, namely, the death of Mrs. Newberry, can be accelerated to the time of the death of Julia Newberry.

The principal of that rule is, that a remainder is accelerated whenever it is apparent that the only object of postponing the remainder-man was, that the property might be enjoyed by the tenant for life. The facts of the present case preclude the idea that the postponement of the time of distribution was simply and only because of this offered testamentary provision as a substitute for the dower estate of the widow, and it was uncertain to the mind of the testator whether the proffered substitute would be accepted or not. There is no more room to say this, than that the postponement was because and on the account of such primary original dower estate, which yet subsists, and will until the death of Mrs. Newberry.

We fail to perceive any failure here of the precedent estate upon which the ultimate remainder was limited. If the time of distribution is to be considered as dependent on a life estate, it must be regarded as only contingently so on this particular testamentary substitute, in case of its acceptance; and that, if not accepted, it was dependent upon the dower estate; that it is to be viewed as fixed with reference to whichever estate should ultimately be and remain the estate of the widow, according as she should accept or renounce the provision under the will. A life interest, the dower estate, yet remains in the widow. There is, too, the trust estate. The intermediate estate is not gone and out of the way. We deem this view sufficient without noticing other objections which have been urged against the applicability here of the rule of acceleration.

The testator might very well prefer, whatever the motive, that his estate should be kept together during the life of the members of his immediate family, and he has most distinctly shown that to have been his purpose, and directed explictly that the property should not be divided and distributed until after the termination of the three

lives. If we leave the words of the will, and seek for the object of the testator in postponing the distribution, when both daughters had died without issue, until after the decease of his wife, it cannot well be found to be because it was thought necessary that the whole of this large estate should be kept to support a trust to pay an annuity of ten thousand dollars to the wife. But a small portion of the estate would be needed to produce that annuity, and it might have been provided for, as was done by the Court in *Sears* v. *Hardy*, 120 Mass., 524, by setting aside a part, say $200,000, of the personalty of the estate, invested in such securities as are directed by the will. Then the rest of the estate would be disengaged. And this, too, seems to show that this annuity would have been at least no more of an incumbrance in point of extent upon the estate than the dower interest. The annuity, as remarked, not having been made any express charge upon the estate by the terms ot the will.

Upon the assumption that the period of distribution is in true meaning appointed, not upon the death of the widow, but upon the termination of the life estate in the testator's estate, it must have been in order that the division and distribution contemplated by the testator might be made, and not because of the necessity of this whole estate to support the annuity of $10,000 to the widow. It was an integral, complete disposition of his entire estate he desired to make, which could not be made before the falling in of the reversionary estate; and it must be taken that the reversionary estate, however arising, was the reason of the postponement. Until the death of the dowress, the reversion expectant in the dower lands will not be subject to the distribution.

It is the plain purpose of the will that the division and distribution should not be made until after the termination of the three lives, only at a time after the whole estate

should have fallen in to the trustees, disencumbered of all further uses, for the two daughters or the widow.

We can come but to the one conclusion, that the period of distribution appointed by the will has not yet arrived, and will not until the death of Mrs. Newberry. To determine otherwise would seem to us to be, in this particular, making a will for the testator, instead of expounding the one which he has made.

The decree must be reversed, and the cause remanded for further proceedings, in conformity with this opinion.

Decree reversed.

mrs Newberry Died in Paris, Dec, 9, 1886.

Newberry Library founded 1886